

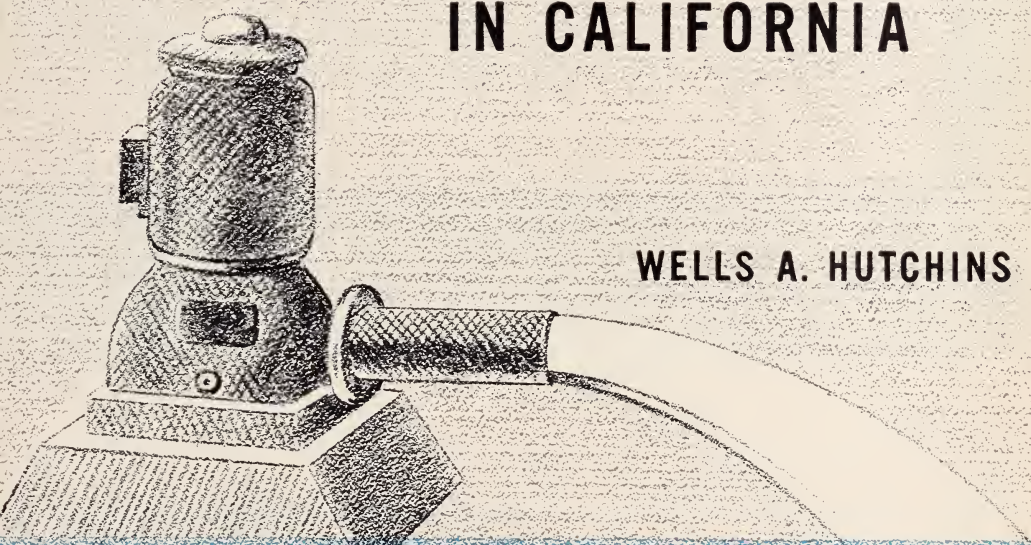


Division of Agricultural Sciences
UNIVERSITY OF CALIFORNIA

IRRIGATION WATER RIGHTS

IN CALIFORNIA

WELLS A. HUTCHINS



CALIFORNIA AGRICULTURAL
Experiment Station
Extension Service

CIRCULAR 452

California farmers who use irrigation water . . .

or plan to use it . . . need to know something about water rights. The subject is not a simple one; for there are several kinds of water rights in this state, and each is subject to a somewhat different set of laws. This circular explains, in layman's language, the principles set forth in these laws and in laws on water wells and dams.

If a farmer plans to acquire a water right . . .

this will outline the ways of doing it.

If he has a water right already . . .

this will explain how it is used, held, protected . . . and how it can be lost.

THE AUTHOR

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WATER RIGHTS IN CALIFORNIA

Even if he gets his water from an organization . . .

an irrigation district, say; or a mutual, public-utility, or private-contract company . . . the circular may help him understand his water situation. It explains briefly the kinds of rights these organizations may hold and the various bases on which they distribute water to farmers.

But this circular doesn't take the place of a lawyer

It doesn't give legal advice. It simply explains general principles. If a farmer is in doubt about his water right, or if he is having a conflict over it, he should consult a lawyer.

If there are specific questions about water rights, the table of contents on the next page may help in finding the answers.

WATER RIGHTS ARE PROPERTY RIGHTS



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Irrigation Water Rights In California

Wells A. Hutchins

This circular summarizes the principles upon which the irrigation water rights of California farmers are based. These principles govern chiefly the acquiring, determining, administering, holding, utilizing, and loss of water rights.

The discussion relates solely to water rights that are recognized by the water laws of California. These water laws comprise both statutes and court decisions, as well as a constitutional amendment, which differ in many important respects from those of other states.

Basically, all water rights in California are governed by the same principles and laws, regardless of use. However, the specific nature and extent of the right may depend on the particular use, such as irrigation, domestic use, generation of power, mining, and recreation. Although generally applicable to all water rights in California, this circular considers water rights primarily as they are applied to use of water for irrigation.

The circular is intended to acquaint California farmers with the nature of water rights for irrigation in this state and with the way such rights are acquired, held, utilized, and lost. Its purpose is purely educational, with no thought of furnishing legal advice. Anyone who is having a controversy over water rights, or who is concerned about his water-right situation—or perhaps even planning some substantial change in his rights—should consult a lawyer.

*We focus on
IRRIGATION
water rights*

*If there are
difficulties,
consult a lawyer*

In this circular the administrative powers and functions of the State with respect to water rights are stated as being vested in the Department of Public Works, acting through the State Engineer. However, consideration of the reorganization of certain of the State agencies dealing with water matters is included in the Governor's call for a special session of the Legislature to meet concurrently with the budget session commencing March 5, 1956. Therefore it is possible that the present authority of the Department of Public Works with respect to the appropriation of water and other matters discussed in this circular may be transferred to another agency. But it is not presently contemplated that there will be any other change in the procedures, nor any change in the substantive law.

GLOSSARY

Many of the terms used in this circular have technical meanings in the field of water law. The following definitions are intended to present the terms accurately in nontechnical language.

IRRIGATION WATER SUPPLIES

*Does the water
come from ...*

*a watercourse
(natural stream)?*

The chief sources from which the California farmer obtains his supplies of irrigation water are defined in the following paragraphs.

A *watercourse* comprises (1) a natural stream of water (2) flowing in a definite natural channel (3) from a definite source or sources of supply. It includes both the surface flow and the underflow.

It is not necessary that the stream shall flow constantly. The requirements of a watercourse are satisfied even if the stream flow is intermittent, provided that that is characteristic of streams in the general area.

A watercourse includes connected springs, lakes, ponds, sloughs, and tributary streams.

A watercourse is distinct from water flowing vagrantly over the surface of the ground from a temporary source such as local rainfall. Such water is called *diffused surface water*.

*underground
stream?*

Ground water is water in the ground that is capable of being extracted by pumping or otherwise. In California water law, ground water is divided into (1) definite underground streams and (2) percolating waters.

A stream of water flowing through the ground in a known and definite channel is called a *definite underground stream* or *defined underground stream*. It has the same essential features as a surface watercourse, except that it is buried in the ground.

*percolating
ground water?*

The *underflow* or *subflow* of a surface stream comprises the ground water flowing in the same direction as the surface water and in intimate contact with the surface flow. It is one phase of the term definite underground stream.

Water moving slowly through the soil, not a part of any definite underground stream, is called *percolating water*. Percolating water may or may not be under artesian pressure.

A spring is a place where water issues naturally from the ground upon the surface of the earth.

Water brought into one watershed from another watershed is called *foreign water*.

*or another
watershed?*

The portion of a supply of foreign water that escapes or is released from the lands or works of the water user into a natural channel is *return flow from foreign water*.

WATER RIGHT

A *water right* is a right, granted by law, to take possession of water occurring in a natural source of water supply and to divert the water and put it to a beneficial use on or in connection with land.

*A water right in
good standing
may be . . .*

Water rights may be impaired or lost because of certain processes that are recognized by law. In the following definitions it is assumed that the water right came into being unimpaired and that it suffered no impairment or loss after it was acquired.

The principal types of irrigation water rights are given below. Each is discussed in more detail in later sections.

Riparian right. The owner of land that is contiguous to or borders a natural stream or lake is entitled to take water from that source for use upon that contiguous land. This right is called a *riparian right*. The land to which it relates is called *riparian land*.

*riparian
if the land
borders a stream*

The riparian right exists solely by reason of location of the land with respect to the water supply.

Appropriative right. A person may acquire a right to the use of water for the irrigation of a particular tract of land, or for other beneficial purposes, by performing certain acts required by law. These acts include taking or diverting the water from a stream or other source and applying it to use on or in connection with the land. If the source of water is a surface or underground watercourse, certain formalities for acquiring the right are prescribed by statute.

*appropriative
if all acts
required by law
are performed*

The person who performs these acts *appropriates* the water, or *makes an appropriation* of the water. Such person is an *appropriator*. The right that he acquires is called an *appropriative right*.

The land to which the appropriative right relates may either be contiguous to the stream, or may be located at a distance from it. In some instances it may lie in a different watershed.

When a supply of water to which several appropriative rights have attached is not enough for them all, the earlier rights have preference over rights of later date. Each right is entitled to its full quantity of water before any water may be taken for rights that are later in time. This superiority over later rights is called the *priority* of an appropriative right.

*correlative
if the land lies
over percolating
ground water*

Correlative right. A person who owns land that overlies a body of percolating ground water is entitled to extract water from the ground for use upon his overlying land. This right is called a *correlative right*.

The correlative ground water right exists solely because the percolating ground water in question underlies the land of the holder of the right.

*prescriptive
if obtained by
infringing
others' rights*

Prescriptive right. A person may possibly divert to his own uses water to which riparian or overlying landowners or appropriators have prior claims, thereby depriving them of the use of water to which they are entitled. If he does this without interruption for a period of five consecutive years prescribed by the State statute of limitations, and if he fulfills certain other legal requirements, he gains a *prescriptive right* against the parties whose rights he has invaded.

The prescriptive right gives the holder a valid right, so far as the parties he has dispossessed are concerned, to continue diverting and using the water to the extent that he has been doing throughout the five-year period.

Under the usual circumstances prescriptive rights can be acquired against downstream parties only.

*Pueblo rights are
ones cities inherit
from Spanish or
Mexican pueblos*

Pueblo right. A California city that succeeded a Spanish or Mexican pueblo (municipality) has the paramount right to the use of water of a stream that flowed through the old pueblo limits, for the use of the inhabitants of the city. This is called the *pueblo water right*. It is not discussed in detail in this circular.

ROTATION

*Holders of rights
may take turns
in diverting water*

Generally speaking, the holder of a water right is entitled to divert or take his water from the source of supply continuously throughout the portion of the year in which his right is effective. Under certain circumstances, however, better results are obtained by an arrangement under which the total quantity of water to which a number of water-right holders are entitled is diverted by each one for a specified period of time, in turn. The use of the stream is prorated among them according to their respective interests by time, rather than by quantity of water. This plan of arranging diversions is called *rotation*.

The operation of a plan of rotation is subject in all cases to the condition that the water is equitably apportioned among the participants and that other water users on the stream are not injured by it.

WATER CODE

The California Legislature in 1943 passed an act consolidating and revising many of the then-existing statutes

relating to water. This act is called the *Water Code*. It has been amended and enlarged at succeeding sessions of the Legislature.

State statutes on water make up the Water Code

The portions of the Water Code that relate to the subject matter of this circular are:

Division 1. General State Powers Over Water.

Division 2. Water.

Division 3. Dams.

Division 4. Wells, Pumping Plants, Conduits and Streams.

Division 11. Irrigation Districts.

The administrative powers and duties prescribed by divisions 1, 2, and 3 of the Water Code are vested in the State Department of Public Works and are exercised through the State Engineer. The State Engineer is Chief of the Division of Water Resources in the Department.

Division 2 contains procedure for the appropriation of water, for the determination of water rights, and for the distribution of water in watermaster service areas. The procedure for appropriating water under the Water Code applies to watercourses and to subterranean streams flowing in known and definite channels. It does not apply to percolating ground water. Percolating ground water is likewise excluded from one of the two statutory procedures for determining water rights.

The portions of the Water Code relating to water rights were taken from the *California Water Commission Act*, which became effective December 19, 1914, and remained in effect until it was superseded by the Water Code. The Water Code did not change the essential provisions of the Water Commission Act. It restated and rearranged them.

The Department of Public Works has adopted *rules and regulations* pertaining to its administrative functions under the Water Code. They have been published in pamphlet form under the following titles:

There are also State rules and regulations

"Rules, Regulations and Information Pertaining to Appropriation of Water in California. 1952."

"Rules and Regulations Pertaining to Protests and Hearings. 1952."

"Rules, Regulations and Information Pertaining to Determination of Rights to the Use of Water in California. 1946."

"Rules and Regulations Pertaining to Supervision of Dams in California. 1948."

Court decisions, it must be remembered, are part of the State law. They have been taken into consideration in the

Court decisions are part of the law

statements in this circular, and a few of the more important are mentioned specifically.

IRRIGATION ORGANIZATIONS

*Irrigation
organizations
may be districts*

An *irrigation district* is a public corporation organized under the *Irrigation District Law*, which is part of the Water Code (division 11, secs. 20500 to 29978). Its chief function is to provide water for irrigating the lands within its boundaries. It may issue bonds, and may tax the included lands to pay its obligations, acquire water rights and physical properties, and operate and maintain the irrigation system. The lands of an objecting minority may be included and assessed if they will be benefited by the district.

or mutual

A *mutual irrigation company* is a private, voluntary association of irrigation farmers, its chief purpose being to provide water at cost for the use of its members. The members own the irrigation system in common. The mutual company may be either incorporated or unincorporated. Many mutual companies are incorporated under the *General Corporation Law* of California, which is a part of the *Corporations Code* (Calif. Corpn. Code, title 1, division 1).

or commercial

A *commercial irrigation company* is an organization that provides irrigation water for persons who have no ownership in the company.

Commercial irrigation companies in California are chiefly of two kinds:

A *private-contract irrigation company* serves water to persons, of its own choosing, with whom it enters into contracts for that purpose.

A *public-utility irrigation company* serves water to the public within its service area, under the regulation of the State Public Utilities Commission (Calif. Pub. Util. Code, secs. 2701 to 2712).

Water Rights are **PROPERTY RIGHTS**

The water right is a *property right*. It is a valuable right. And it is real estate.



So long as water remains in its natural environment, the ownership of the water is *in the public* and not in the holders of water rights that attach to that source of supply. The ownership that individuals acquire with respect to such public water is ownership of rights to divert the water from the source of supply and to put it to use.

Water that is impounded in a reservoir, taken into a conduit, or otherwise reduced to possession and control in the exercise of a lawful water right, however, becomes the *private property* of the holder of the right.

The holder of a water right in an area in which the competition for water is keen needs to be constantly on guard to protect his right against infringement or loss. It is said that "Eternal vigilance is the price of a good water right."

The water right *may be protected by court proceedings* against unlawful acts that infringe the right, just as any other right of property may be so protected.

The protection that the law affords the water right relates to acts that cause *material or substantial injury* to the holder of the right. It does not extend to minor interruptions or interferences with the flow of water in the stream that do no real damage.

Acts that infringe the right may consist of unlawful upstream diversions. These diversions may prevent the full quantity of water to which the user is entitled from reaching his headgate or point of diversion, thus interfering with his use of the water. Or they may deprive him of the water at the times he is entitled to receive it. In either case the value of the water in producing crops may be impaired, perhaps seriously.

Other acts that infringe the right may be upstream operations that result in polluting the water, or in dete-

*Water rights
are real estate*

*Courts protect
the water right*

*The right may be
infringed if ...*

*someone unlawfully
diverts water
upstream*

*or pollutes the
water*

*or interferes with
diversion or
irrigation works*

riorating its quality to such an extent as to render the water unfit for proper use downstream. The holder of the water right is entitled to receive the water in such state of purity as is necessary for the purposes to which his right applies.

Still other acts of infringement may consist of unlawful interferences with one's diversion of water or with the operation of his irrigation works.

The holder of the water right is entitled to damages for past unlawful acts that have caused him substantial injury. And if future injury is threatened, he may be protected by the issuance of a court decree of injunction commanding the offending party to refrain from performing those acts.

Water rights are limited to

REASONABLE BENEFICIAL USE

*No one has a right
to waste water
or use it in
unreasonable ways*

It has long been the law in California that the use of water by an appropriator must not only be beneficial, but also reasonable in relation to the rights of other appropriators and of riparian owners. The *riparian* owner has long been held to a reasonable beneficial use of water as against the owners of other lands riparian to the same stream; but as against appropriators, the riparian owner, *prior to 1928*, was not limited by any measure of reasonableness in his use of the water.

*regardless of the
kind of water right*

In 1928 the California voters adopted an *amendment to the State Constitution* (art. XIV, sec. 3) relating to water rights and uses of water. The amendment provides that water rights in watercourses are limited to the quantities of water reasonably required for the beneficial uses to which the rights relate. Such rights do not include (1) waste of water or (2) unreasonable use or (3) unreasonable methods of use or (4) unreasonable methods of diversion of water. As a result of this amendment, riparian owners are now held to the same standards of use in relation to appropriators as those imposed upon appropriators in relation to riparian owners.

The California Supreme Court has held that the declarations in the amendment are not confined to water rights in watercourses (*Peabody v. Vallejo*, 2 Calif. (2d) 351, 372, 383, 40 Pac. (2d) 486 (1935)). They apply to all uses of water of all natural water supplies to which water rights attach.

The Supreme Court, in interpreting the amendment, has adopted the term *reasonable beneficial use* as expressing the restricting of water rights to uses of water that are both beneficial in themselves and reasonable in relation to other rights that attach to the same water supply.

The purpose of use, such as irrigation or domestic, as distinguished from the handling of water, to which the amendment was directed, is discussed under the several kinds of water rights.

Water rights in

SURFACE WATERCOURSES

THE RIPARIAN RIGHT

Acquiring and Holding

The riparian right is acquired by *acquiring title to the riparian land*.

So far as a tract of riparian land that is now in private ownership is concerned, its riparian right originally accrued or came into being at the time title to the tract passed from the government to private ownership. The government granted the riparian land to the patentee; according to the State law, the patentee thereby became possessed of a riparian right. Therefore his title to the riparian land includes the title to the riparian right that relates to that land.

The patentee of the land was not required to file a claim to the riparian right in any federal, state, or county office either before or after beginning use of the water. Nor is it necessary that any of his successors in title shall do so.

The riparian right is said to be "part and parcel of the riparian land." When the land is sold, the riparian right passes as a part of the conveyance unless the deed declares to the contrary. Other exceptions are noted below under "Severance" (p. 19-23).

The riparian right is held by holding the land. It is *not based upon use* of the water and is *not lost solely by disuse*. So long as loss of the riparian right by prescription is not threatened, the landowner need not make use of the water nor perform other acts in order to hold his riparian right.

Utilizing

Riparian waters. Waters to which riparian rights apply are only those of *natural sources*, chiefly watercourses.

Riparian rights in a watercourse extend to its tributaries that enter the stream above or at the riparian land. This includes tributary spring waters. Riparian rights in the waters of a slough connected with a river apply also to the waters of that river during the times water is flowing from the river into the slough.

Lakes and ponds are included within riparian waters, regardless of whether they are parts of stream systems or have no visible or known connections with surface streams.

The riparian right is part of the land

It is not lost solely by disuse

The right in a stream extends to its sources

*Navigation
comes before
riparian rights*

Riparian rights in a stream attach to the *underflow* as well as to the surface flow.

Riparian rights attach to *navigable* as well as to *non-navigable* waters. The exercise of the riparian right in a navigable stream, however, is subject to the exercise of the public right of navigation. That is, if a proposed diversion of water by a riparian owner interferes with the use of the stream for navigation at a time the public wishes to use it for that purpose, the navigation right takes precedence.

Certain waters are *not available* for the use of riparian owners as part of their riparian rights. These are chiefly as follows:

*Riparian rights
attach only to
natural flow*

Riparian rights do not apply to waters flowing in *artificial watercourses*, such as canals and other conduits constructed for the purpose of conveying water. However, in determining whether riparian rights exist, there are exceptional circumstances under which a watercourse that was originally made artificially will be treated by the courts as though it were a natural watercourse. This has been done in cases in which, for a great length of time, interested parties have utilized and looked upon an artificial channel as a natural channel and the owners of bordering lands have come to depend upon it as such.

Nor do riparian rights attach to *artificial flows* of water carried in natural watercourses. These include appropriated waters that are purposely commingled with natural flows for the purpose of carrying the appropriated waters from one point on the channel to another.

The *return flow from foreign waters* is not part of the flow of a stream to which riparian rights attach. Foreign waters released into a stream with no intent to recapture them are subject to appropriation in the order of priority, and if such waters are not already appropriated by someone else and the riparian owner wishes to use them, he must appropriate them.

Riparian lands. To be riparian to a particular watercourse and entitled to riparian rights in it, a tract of land must meet these requirements:

1. The tract must be *contiguous* to or border the stream and thus give the owner access to the stream waters.

The length of actual frontage on the stream is not material. For example, the entire area of a square 40-acre tract is considered to be contiguous to a stream even though the contact with the stream is only 200 feet or so at one corner.

*A tract having
riparian status
may be reduced*

2. The tract must be the *smallest* tract held in any single ownership in the chain of title leading to the present owner.

This means that the area of land that has riparian status may be reduced by successive conveyances, in which portions of the land away from the stream are sold to other parties without reserving riparian rights in the severed parcels. But the area that is riparian can never be increased.

*but never
increased*

3. The tract must lie within the *watershed* of the stream.

A grant from the government may have included land bordering a stream in watershed A and extending across the divide into watershed B. The portion of the tract in watershed B is not riparian to the stream in watershed A.

*Land not in a
stream's watershed
is not riparian
to that stream*

Land situated in a *delta* formation at the mouth of a stream that is adjacent to the stream, but that slopes away from its banks, is not considered as being outside of the watershed. It is considered riparian to the stream.

Land contiguous to a stream and within the limits of a *municipality* is entitled to riparian rights to the same extent as though it were outside the municipality. If the municipality owns such land, it has the same rights with respect to it as any individual would have. But a city, simply because it lies upon a stream or owns land contiguous to the stream, has no right to take water from the stream for the use of its inhabitants who live on non-riparian land within the city.

Place of use. The water of the stream in which riparian rights are claimed must be used on or in connection with the *riparian land* only.

*Riparian water for
riparian land only*

The landowner's riparian right does not entitle him to take the water away for use on nonriparian land. Nor does it entitle him to let someone else do it. If he grants his riparian right to another party he simply waives his own right to object to his grantee's diversion. The effect of such a grant is stated under "Severance" (p. 22-23).

Diversion. The riparian owner may divert the water from the stream at *any convenient point* on his riparian land.

*It may be
diverted at any
point on the
riparian land*

The quantity of water to which the riparian owner is entitled may likewise be diverted by him at some point *upstream* from his riparian land under the following conditions only:

1. The quantity which the riparian owner has the right to take from the stream on his land may be diverted upstream only during such periods of time as the water would reach his land under natural conditions. That is, if the water would be lost by seepage and evaporation before reaching his land, the riparian owner has no right to go above the place of loss and make his diversion there.

*or upstream under
some conditions*

2. Owners of riparian land lying between his proposed point of diversion and his own riparian land are not

deprived of water reasonably required for their intervening land.

3. The necessary easements or rights of way for his headgate and canal are obtained.

The water may be diverted either by gravity or by pumping from the stream. In general, *any method of diversion* may be used that results in getting the water from the stream onto the land without causing injury to other landowners or holders of water rights in the stream, and that is reasonable under all of the circumstances.

Riparian proprietors may agree among themselves that their several diversions of water from the stream shall be made in *rotation*. And in contests between riparian owners, the courts are authorized to impose plans of rotation upon the parties whether or not they consent, if this will be generally beneficial and will not substantially injure any of them, nor impair other water rights in the stream.

Return of water. The portion of the water diverted by the riparian owner that is not consumed must be *returned* to the stream for the use of holders of rights downstream.

*Unused water must
be returned*

The general rule is that the water must be returned to the stream at or above the lower boundary of the riparian land. However, if the holders of rights downstream who wish to use the returned water are located some distance below the riparian land on which the water has been used, the water may be returned at any point above their places of diversion.

Purpose of use. The water may be put to *any use* on or in connection with the riparian land that is *beneficial*.

*Water must be used
for beneficial
purposes*

Irrigation, domestic use, watering of livestock, manufacturing, development of power, and recreational uses are all proper riparian uses of water.

The riparian rights of land contiguous to a natural lake may include the right to have the *water level in the lake* maintained at its natural elevation. This is the case where the value of the riparian land depends upon the maintenance of the lake level at that approximate elevation for recreational or other purposes.

*Lake-water rights
include the water
level*

Irrigation of land is a beneficial use and within the riparian right not only when the irrigated land is planted to cultivated crops, but also when it is in native grasses only.

Method of use. *Any method* of applying irrigation water that is reasonable under all of the circumstances, and that does not result in unnecessary waste of water or in injury to land (erosion, waterlogging, and so on), may be employed. This may be an artificial method, such

*Water must be
handled in
reasonable ways*

as ditches or pipes. Or it may be simply natural overflow from the stream, the excess water draining back into the stream as the flood subsides.

Preferences in use. Uses of water under the riparian right are divided into two classes: (1) Natural or ordinary uses, and (2) artificial or extraordinary uses.

Natural uses of water are those necessary to maintain the lives of the occupants of the riparian land. These comprise drinking, other household uses, and the watering of domestic animals necessary for the sustenance of the farm family.

Artificial uses of water are commercial or business uses. These include irrigation, the watering of large herds of livestock, manufacturing, and development of power.

The natural uses of water are *preferred uses*. The preferences may be exercised in two ways:

1. The riparian owner may take from the stream all the water that he needs for these purposes of sustaining human life on his farm. If the flow of the stream is only enough to supply his requirements, it is not necessary that he share the flow with downstream owners who may want it themselves for their own natural requirements.

2. When the supply of water in the stream is not enough to supply the requirements of all riparian owners for both natural and artificial purposes, the natural uses have the preference to the full extent of their water requirements. The excess water, if any, is prorated among the riparian owners for the partial satisfaction of their several requirements for irrigation and other artificial purposes.

The preference in favor of natural uses of water must be exercised in a reasonable manner. It applies only to the quantity of water that the preferred user actually needs, and it does not entitle him to waste any of the water.

Relative rights of riparian owners. The riparian irrigation water right is a *relative*, not an absolute right. The extent of each individual right is determined by considering all riparian rights in the stream.

For irrigation and other so-called *artificial* purposes, each riparian owner is entitled to make a reasonable use of the water of the stream on his riparian land. The question as to whether a particular riparian owner's use of the water is reasonable is determined by considering the reasonable water requirements of all of the lands that are riparian to the stream.

No riparian owner has priority over any other riparian owner simply because he *used the water first*. So long as one's riparian right is intact, he may begin use of the water at his pleasure, and may successfully demand his

Needs for sustaining human life come first

Excess over this is prorated

"Reasonable" means in view of others' needs and rights

Priority in time of beginning use does not apply to a riparian right

equitable share of the water even though other riparian owners may have been using it for a long time.

*Courts may
apportion flow
among riparians*

Apportionment of water. If the flow of the stream is not enough to supply the wants of all riparian proprietors for irrigation or other *artificial* purposes, each is entitled to a *fair share* of the available supply. The courts have power to *apportion* among the riparian proprietors the water to which they are collectively entitled.

There is no set formula for decreeing an apportionment of water among riparian owners. Matters that are taken into consideration include the quantity of water available; the extent of irrigable land of each proprietor; the character of the soil; the practicability and cost of irrigating the lands; and the uses to be made of the water.

As riparian rights are relative with respect to each other, an apportionment based upon proportions of the stream flow is more consistent with the nature of the riparian right than is the assignment to each riparian proprietor of a specific quantity of water.

An apportionment of the water is based upon the circumstances that prevail at the time the apportionment is made. It is subject to modification whenever the conditions change sufficiently to justify a new or modified apportionment.

*The holder of a
riparian right may
appropriate water*

Appropriation of water by riparian owner. In California, an owner of riparian land may make an *appropriation* of water of the stream to which his land is contiguous, for use in irrigating that land, without forfeiting or impairing his riparian right in any way.

*He can use either
or both rights*

Under some circumstances he may find it advantageous to exercise his riparian rather than his appropriative right. This might occur, for example, if the appropriative right had been acquired after most of the riparian lands had passed into private ownership and if the irrigation demands of other riparian owners were considerable. On the other hand, an appropriation of winter flood flow for storage might provide the riparian landowner with water late in the season after the normal flow had become too low to be of material use.

*but his total use
must not exceed
reasonable needs*

In controversies with other parties who claim water rights in a stream, one who possesses both riparian and appropriative rights in that stream with respect to the same tract of land may rely upon either or both of his water rights. It is important to note that such duplication of kinds of water rights does not necessarily result in giving the riparian owner the sum of the quantities of water claimed under each of his rights. The maximum quantity of water that may be successfully claimed under any water right, or any combination of rights, cannot

exceed the quantity required for reasonable beneficial use in connection with the riparian owner's land.

Severance

Although the riparian right is "part and parcel" of the riparian land, it is not an inseparable part of the land.

There are ways in which the riparian right may be *separated or severed* from the land. There are also conditions under which the severance may be prevented and the right *preserved* in the land.

Severance of the right from the land under some circumstances may involve a total uncompensated loss to the landowner. In other cases he may receive something in consideration for voluntarily agreeing to surrender the right. If his right is condemned for public use, he receives compensation for being deprived of the right.

Severance of the riparian right from the land, then, may mean a total loss to the landowner, or it may mean only a partial loss to him, or it may mean no loss at all in terms of money value of the right. Because it more accurately expresses the whole group of features relating to separation of the riparian right from the riparian land, *severance* of the right is being used in the heading of this topic rather than *loss* of the right.

Under each of the following subtopics, the principles relating to the *severance* of the riparian right from the land and to the *preservation* of the right and *prevention of severance* are considered together.

Prescription. The riparian right may be severed from the land and lost to the landowner by adverse use on the part of another party under the circumstances necessary to vest in the adverse party a prescriptive right. This is called losing the riparian right, or a part of it, by *prescription*.

In most cases it is necessary that the adverse use be made upstream from the riparian owner's land or place of diversion. This is because downstream use of water is seldom adverse to the rights above.

To result in loss of the right it is necessary, among other things, that the adverse use be made for a period of five consecutive years and that the riparian owner as a result be deprived of the use of the water or of the possibility of its use throughout that period.

The riparian owner, before the expiration of the five-year prescriptive period, must take *measures to protect his right* if its threatened loss is to be averted. Effective measures include *actual physical interruptions* of the adverse diversion and use. They also include the *filing of suit* to stop the adverse use. Such a lawsuit need not be

*A riparian right
can be severed
from the land*

*It can be lost
by prescription*

*But the holder can
prevent the loss
if he stops the
diversion . . .*

or files suit in
court

concluded before the end of the prescriptive period, but to be effective, it must be prosecuted to successful conclusion. Any of these protective measures, if successful, prevents the loss of the riparian right so far as that particular adverse use is concerned.

A riparian owner who is not making use of the water, but whose riparian right is threatened with loss by prescription, may obtain from the court a judgment and decree protecting his unused right. This is called a *declaratory judgment* or *declaratory decree*. It must be applied for prior to the expiration of the five-year period of limitation.

The declaratory decree defines the right of the riparian owner; enjoins the adverse user from making use of the water to which the riparian owner is entitled during such times as the latter rightfully requires it; and enjoins the adverse party from asserting an adverse right, regardless of whether the riparian owner chooses to use the water or to refrain from using it. This not only prevents that particular adverse use from ripening into a prescriptive right, but also prevents the party against whom the injunction is directed from obtaining, in the future, a prescriptive right against the riparian owner with respect to the same water right.

Severance of contact of land with stream. A particular area of land that is part of a single tract of riparian land may *lose contact* with the stream channel in various ways. Loss of contact with the stream may involve *loss of riparian rights*. However, such loss of riparian rights may be prevented under certain circumstances.

The ways in which contact of land and stream may be severed and riparian rights as a result separated from the land, and the circumstances under which the rights may be preserved in the land notwithstanding the severance of contact, are chiefly as follows:

When a riparian
tract is divided

1. In the *subdivision* of a tract of riparian land, parcels lying along the stream may be sold to certain parties and parcels back from the stream to other parties. These back parcels therefore are no longer contiguous to the stream. Ordinarily, if the deeds conveying these parcels thus detached from the stream make no mention of water rights or uses of water, their riparian rights are *lost* by reason of the sale.

back parcels may
lose the rights

If the riparian right of a parcel detached from the stream is once lost, it can never be regained. This is the case even if the owner of the riparian land lying between that detached parcel and the stream should buy that parcel and thus make it again part of one ownership in contact with the stream.

There are ways in which the riparian rights of detached parcels of a subdivided riparian tract may be *preserved*.

The riparian rights of detached parcels may be preserved by showing that the parties to the transfer of the land intended that the parcels should continue to have riparian rights. Such a showing is most satisfactorily made where the intention is expressed in specific terms in the deed of conveyance. But if the deed is silent on this matter, the intention still may be implied by the circumstances. Such circumstances may be the existence and prior use of irrigation ditches leading from the stream to the detached parcel, and the actual watering of that area of land.

*but not if intent
to continue them
can be shown*

Preservation of riparian rights in detached parcels has been effected by employing a *mutual irrigation company* for serving water to the subdivided lands as a part of the whole plan of development. The first step in one such case was the transfer of the riparian rights of the entire tract to the company in exchange for the shares of its capital stock. Purchasers of the various parcels of subdivided land then received shares of the mutual company stock in proportion to their acreage. The riparian rights remained with the land, whether bordering the stream or detached from it, regardless of the formal transfer of rights to the mutual company. And the irrigation company acted as the agent of the landowners in serving water to their lands.

*A mutual company
has been used in
such divisions*

2. The riparian rights of a tract of riparian land owned in common by several parties may be divided among them by a *court decree that partitions the land* among the several owners.

The decree may provide specifically that the riparian rights shall be preserved in all of the subdivided parcels. Or it may expressly provide for preserving the right in certain parcels and for not preserving it in others, or may allocate limited riparian rights to certain parcels.

*Rights may be
kept or lost in a
partition decree*

If the decree of partition says nothing about water rights, riparian rights are *preserved* in all of the subdivided parcels, including those severed from contact with the stream.

3. The *channels of streams sometimes shift* as the result of floods. In the case of a gradual change, the legal boundary of riparian land bounded by the channel changes with the channel itself. If the change is sudden and violent, the legal boundary of the land remains where it was prior to the change. A sudden, violent change is called *avulsion*.

*If the stream
moves away from
the riparian land . . .*

After a sudden change in the stream channel, the riparian owner may *restore the stream* to its original channel under certain conditions. These conditions are that

*the channel may be
restored under
some conditions*

the restoration be made within a reasonable time, and that it be made without trespassing on the lands of other persons. If this is done, the original boundary of the land and the status of its riparian rights are preserved.

If the restoration of the stream to its original channel is not made under those conditions, land severed from contact with the stream by avulsion *loses its riparian rights*.

*In subdividing,
riparian rights
may be reserved*

Grant of contiguous land without water right. An owner of riparian land may sell the land without the riparian right. This may be effected by a deed that conveys the land but contains a clause reserving the riparian right from the conveyance.

In this way a riparian owner may sell part of his land bordering the stream on a dry-land basis, and at the same time *reserve* the entire water right for his own use on the portion of the land that he retains.

*Riparian rights
may be waived
by a grant*

Grant of riparian right. The riparian owner may grant his riparian right to another person who proposes to divert the water to nonriparian land.

Such a grant is not made in the exercise of a riparian right. Nor is it really a transfer of the riparian right to nonriparian land.

The riparian owner himself is not entitled to take the water away to nonriparian land; and he cannot authorize another person to do what he himself has no right to do. But he can lawfully contract with another party that he will make no objection to the acts of that party in diverting water from the stream to nonriparian land.

The *only effect of the grant* of a riparian right to one who wishes to take the water to nonriparian land, then, *is to waive the right of the grantor to object* to the diversion by the grantee. The contract is binding not only upon the parties, but upon their successors in interest as well.

*but this doesn't
bind other owners*

The grant of a riparian right to another person for use on nonriparian land is not binding upon the other riparian owners on the stream, unless of course they consent to it. If one riparian owner chooses to make no use of the water, the others are entitled to use his share if they need it. Notwithstanding his grant, the grantee of the riparian right will not be allowed to divert the water to nonriparian land if the other riparian owners need the water on their own riparian lands.

*nor cause complete
loss of the right*

The grant of a riparian right does not effect a complete severance of the right from the land. The riparian owner has contracted to refrain from asserting his right against his grantee. But *the right still exists with respect*

to the other riparian owners. As against them, the right may be exercised whenever the nonriparian grantee is not using the water.

Condemnation. The riparian right may be condemned for public use under the laws relating to *eminent domain*.

The landowner whose right is taken from him by eminent-domain proceedings is entitled to just compensation for the taking away of his property. This is his constitutional right.

Forfeiture not applicable. The Water Code provides for the *forfeiture* of certain water rights for failure to use the water for the purpose for which it was appropriated or adjudicated (sec. 1241). *This does not apply to riparian rights.*

Riparian rights are not lost solely by reason of nonuse of the water.

The right may be condemned for public use

THE APPROPRIATIVE RIGHT

Acquiring

By following the Water Code procedure. A person who wishes to appropriate water out of a watercourse is required to follow the detailed procedure set out in the Water Code (secs. 1200 to 1677).

1. The first step is to file, with the Department of Public Works, at Sacramento, an *application* for a permit to make the appropriation. The duties of the Department with respect to the appropriations of water are performed through the State Engineer.

The application is made on forms furnished by the Department. It must give details of the proposed undertaking, including nature and amount of use of the water, location and description of works, place of diversion, place of use, and times of beginning and completing construction and applying the water to the proposed use. Special information is required with respect to agricultural and other named uses of the water, and to storage features if storage is intended. The applicant must show that he has the necessary rights of way from the stream to his land, or at least a reasonable prospect of obtaining them. Appropriate maps and drawings are a part of the application.

Fees to be paid upon applications are prescribed by the Water Code (secs. 1525 to 1533).

2. A *notice* of the application, summarizing its features, is prepared by the Department. If the application is for more than 3 cubic feet per second or for more than 200 acre-feet per annum of storage, the applicant must cause the notice to be published, at his own expense. If the application is for less than those quantities of water,

The Water Code sets procedure for appropriation

An application must be filed

and a fee paid

and notice given

copies of the notice must be mailed by the Department to interested local parties, and copies must be posted by the applicant in at least two conspicuous places in the locality.

There may be protests and a hearing

3. A written *protest* against the approval of the application may be filed by any person interested. The Department holds a hearing upon a protested application. The Department may hold a hearing upon an unprotested application also, but is not required to do so.

The Department may grant or reject

4. The Department is *required to act* upon the application. It may grant the application; but, if the application is protested, only after a hearing. Or, after a hearing, the Department may reject the application.

Any person interested in the application who objects to the final action of the Department may file suit in the superior court to have the *action reviewed*. The court renders judgment affirming, reversing, or modifying the Department's action.

If granted, a permit to start is issued

5. Upon approval of an application the Department issues a *permit* to the applicant.

The permit specifies the conditions under which the quantity of water authorized by the Department may be diverted and used. It specifies periods of time for beginning construction work, for completing construction work, and for applying the water to the proposed beneficial use. These periods may be extended by the Department upon a showing of good cause for delay.

If the permittee fails to carry out the terms of the permit, the Department may *revoke* the permit after a hearing. The permittee may file suit in the superior court for a review of the order of revocation.

after permit fees are paid

Fees due upon the issuance of permits are specified by the Water Code (secs. 1540 to 1545).

6. Upon completion of a project the permittee reports the fact to the Department, which makes an inspection to determine whether the authorized work has been performed satisfactorily.

A license is issued when the project is completed

If the Department's determination is favorable, a *license* is issued to the permittee. This confirms his right to divert such quantity of water as he has applied to beneficial use.

If the determination is unfavorable to the permittee, issuance of the license is refused. The permittee may file suit in the superior court to have the *order reviewed*.

It can be revoked later for cause

A license that is not being put to proper use may be *revoked* by the Department. The order of revocation may be modified or set aside by a court action brought by the licensee or his successors in interest.

A copy of each license and revocation of license is filed

by the Department with the *county recorder* of each county in which the points of diversion and places of use of the water are situated.

7. If the appropriation is completed in conformity with the provisions of the Water Code and with the Department's rules and regulations, the *priority* of the right is represented by the date of filing the application with the Department (Water Code, sec. 1450).

The Water Code procedure is exclusive. The procedure contained in the Water Code for appropriating water from a watercourse is exclusive. There is *no other method* by which such an appropriation may be made. As noted later (p. 44-45), this procedure does not apply to percolating ground water.

Prior to the adoption of the California Civil Code in 1872, no method of appropriating water had been prescribed by the Legislature. An intending appropriator simply diverted the water from the stream and applied it to a beneficial use on or in connection with certain land.

The Civil Code in 1872 provided a formal procedure for appropriating water. The intending appropriator posted a notice at the proposed point of diversion, filed a copy with the county recorder and began construction within prescribed periods, carried out the construction work diligently, and applied the water to beneficial use. He obtained certain advantages by following the Civil Code procedure, but was not required to do so. He could still appropriate water lawfully by diversion and use, without following the statute.

The Water Commission Act, which became effective December 19, 1914, contained the procedure now codified in the Water Code. As of that date, previous methods of appropriation of water of watercourses were superseded by the present statutory method.

Restrictions in acquiring the right. The permit to appropriate water relates to *unappropriated* water only.

The Department in issuing a permit may impose *conditions* aimed at the best development, conservation, and utilization of the water. If in the judgment of the Department a proposed appropriation would conflict with the public interest, the application must be rejected.

An application to appropriate water may be granted in part and rejected in part. As indicated earlier, rejection of applications and the imposition of restrictions are subject to court review.

Preferences in acquiring the right. The Water Code declares the established policy of the State to be that the use of water for *domestic purposes* is the highest use

*It must be
recorded*

*Priority depends
on the date of
filing application*

*Appropriation under
the Civil Code
began in 1872*

*Domestic use is
the highest use*

of water and that the next highest use is for *irrigation* (sec. 106). The Department is directed to be guided by this policy in acting upon applications to appropriate water (sec. 1254). In acting upon applications to appropriate water, the Department must consider the relative benefit to be derived from all uses of the water concerned (sec. 1257).

If two or more conflicting applications for different purposes are pending at the same time, the first preference would be given to domestic use and the second to irrigation. Or, in issuing a permit for a nonpreferred use of water, a condition may be inserted to the effect that the right shall not interfere with future appropriations for preferred uses.

*Municipalities
are given certain
preferences*

Municipalities are granted by the Water Code certain preferences in appropriating water for domestic and municipal purposes. Such application by a municipality for municipal purposes or the domestic needs of its inhabitants is first in right irrespective of whether it is first in time (sec. 1460). This preference relates to future appropriations. It does not authorize a municipality to take away existing vested rights. Vested rights may be taken for public use only by purchase or condemnation.

A municipality may appropriate quantities of water for its municipal purposes based upon estimated future requirements. Pending the use by the municipality of the entire appropriation, the Department may issue permits for the temporary appropriation of the excess over current needs. When the municipality is ready to take the water used by a temporary permittee, it must compensate him for the value of the works by means of which he has been using the water. Or the Department may authorize the municipality to distribute the surplus temporarily under the jurisdiction of the California Public Utilities Commission. (Secs. 1461 to 1464.)

*A large project
need not be
finished at once*

Gradual or progressive development. An irrigation project may be developed *gradually*, or in *progressive units*, if the circumstances justify it. This is particularly true with respect to large projects. But even a single farmer may require more than one season in which to get his entire farm irrigated after the water is ready for use.

The length of time which an appropriator may have in progressively completing his appropriation depends upon the circumstances. His original plan must be to include the entire area in one appropriation. His intention must be to proceed promptly and diligently with the construction of works and application of the water to beneficial use. And he must carry out the intention to conclusion of the project with all reasonable diligence.

The Department allows such time for completion in each case as appears to be justified by the local conditions. But it will not authorize a reservation of water if there is no immediate plan or purpose to proceed promptly and to continue diligently to completion. (Calif. Dept. Pub. Works, "Rules, Regulations and Information Pertaining to Appropriation of Water in California," pp. 26-27 (1952); Calif. Admin. Code, secs. 776 to 778.)

Holding

The appropriative right is held by *exercising it properly*.

The right must be exercised properly

Unlike the riparian right, the right of appropriation is based upon use and may be lost by nonuse of the water. The Water Code provides that when the appropriator or his successor in interest ceases to use the appropriation for some useful or beneficial purpose, the right ceases (sec. 1240).

Utilizing

Important *elements* of the appropriative right are (1) the priority of the right, (2) the quantity of water to which the right relates, (3) the period of use of the water, (4) the point of diversion of the water, (5) the place of use of the water, and (6) the purpose of use of the water. These elements are discussed in that order.

Priority of the right. *Priority* in time of making the appropriation gives the *superior right*. This principle was expressed in the Civil Code of 1872 (sec. 1414) as follows: "As between appropriators, the one first in time is the first in right." Aside from certain exceptional deviations authorized in acquiring rights under the Water Code (see "Preferences in acquiring the right," p. 25, above), this is still a fundamental principle of California water law.

"First in time is first in right"

Each appropriation of the water of a stream is superior to all later appropriations in point of time and is subordinate to all that were made at earlier times. If the water of a stream at a particular time is just enough to supply part of the appropriative rights that attach to the stream, the earliest priorities are entitled to the entire flow and the later ones must do without any water at all. As the flow of the stream decreases, the headgates of the appropriators must be closed in the reverse order of priorities until, if there is no more water than enough to supply the first priority, the holder of that right is entitled to it all. As the flow increases, the headgates may be opened in the order of priorities.

Where water is diverted doesn't affect priority

Relative *locations of diversions* of appropriators along

the stream have nothing to do with relative priorities. Headgates of senior appropriators may be upstream from those of junior appropriators, or may be downstream from them. The several priorities depend only upon the respective times of acquiring the rights.

The priority of an appropriative right is represented by a date, called the *date of priority*. If the right is consummated in accordance with law, and with reasonable diligence, it dates back to the time of beginning the acquirement of the right. This is called the *doctrine of relation*.

In the early history of California, the priority of an appropriation upon its completion related back to the time of taking the first step in appropriating the water if the appropriator was diligent throughout. This first step may have been the posting of notice of appropriation, or the beginning of construction of the diversion works or of the ditch if no notice was posted. If the appropriator was not reasonably diligent, the priority was fixed as of the time of completion of the appropriation.

In appropriating water under the Water Code the same principle of relation back applies, namely, the date of filing the application with the Department is the date of priority if all subsequent steps are properly taken (sec. 1450). Sickness and lack of finances are not accepted by the Department as excuses for delay, but adverse weather conditions are (Calif. Dept. Pub. Works, "Rules, Regulations and Information Pertaining to Appropriation of Water in California," p. 26 (1952); Calif. Admin. Code, sec. 777).

Quantity. The appropriative right relates to a *specific quantity* of water. For irrigation purposes, this is usually expressed in cubic feet per second or in miner's inches of flowing water, and in acre-feet per annum of stored water.

The measure and limit of the appropriative right is reasonable beneficial use of water. Regardless of the extent of a particular appropriator's right as stated in his permit or license or court decree, at no time is he entitled to divert more water than the quantity required to satisfy his reasonable requirements at that time. He has no title to any excess water that he may divert. If he diverts more water than he needs, it is his duty to return the surplus to the stream.

Period of use. The appropriative right may be acquired for use throughout the year if the circumstances justify it, or during a specific part of the year.

The appropriation may be *measured by time* as well as by quantity. If one person appropriates a supply of

*There aren't many
excuses for delay
in completing right*

*The license is for
a definite amount
of water*

*But the holder has
no title to any
excess over needs*

*The right may be
for a given time
of year*

water for use, say, during April to October, inclusive, of each year, another person may make an equally valid appropriation of the same supply during the remainder of the year, November through March. Or one person may have a right to the water during the daytime and another a right to that same water at night. Each has a prior right during his period of use so far as the other is concerned, regardless of which of the two rights was first acquired.

or day

Point of diversion. The water that one appropriates is taken from the stream at a specified *point or points of diversion*. The appropriator has no right to take the water out at any other place unless his point of diversion is changed in the manner prescribed by the Water Code (secs. 1700 to 1706).

Water must be diverted at a certain place

Place of use. The appropriative right is perfected by applying the water to the irrigation of land or to some other use on or in connection with a particular tract of land. That land—whether irrigated, or the site of use for domestic purposes, power development, or other lawful purpose—becomes the *place of use*. It remains so unless and until the use is changed to other land in the manner authorized by the Water Code (secs. 1700 to 1706).

and for a certain tract

It is not necessary that the place of use of appropriated water shall be land contiguous to the stream from which the water is taken. The land may border the stream, or it may be miles away from it.

Under certain circumstances the place of use may be established in a *watershed* other than the one in which the diversion is made. This is subject to the condition that preëxisting rights in the original watershed may not be impaired by the exportation of the water. Furthermore, in the development of State projects, areas in which water originates may not be deprived of water reasonably required for the beneficial needs of the inhabitants (Water Code, secs. 10505 and 11460).

Purpose of use. Water may be appropriated for *any beneficial purpose*. Purposes that are recognized as beneficial include, among others, domestic, municipal, irrigation, power, mining, industrial, recreational, and stock-watering uses.

Water may be appropriated for any beneficial purpose

The California Supreme Court has held that a use of water for the sole purpose of exterminating pests, in an area in which water is in great need for the irrigation of crops, is not a beneficial use for which an appropriation may be made. (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Calif. (2d) 489, 567–568, 45 Pac. (2d)

Use of scarce water to kill pests is not beneficial

972 (1935)). Other means must be taken to get rid of the pests.

*But irrigating
native grasses is*

Appropriations of water may be made for the irrigation of uncultivated lands that are producing native grasses, whether pastured or cut for hay, as well as lands in cultivated crops. A use for such purpose that exceeds 2½ acre-feet of water per acre in any one year, however, is not a beneficial use in connection with any appropriation to which the Water Code relates (sec. 1004).

The purpose of use of appropriated water may be changed only in the manner and under the conditions prescribed by the Water Code (secs. 1700 to 1706).

*One can
appropriate only
public water*

Waters. In general, appropriations may be made only of waters (1) in a *public source* of supply, (2) occurring there *naturally*, or after *escape or release* from irrigated lands or water works, and (3) in *excess* of the requirements of existing riparian and appropriative rights that attach to the source of supply. An appropriation necessarily is subject to all valid water rights in existence at the time the appropriation is made.

*that is in excess
of earlier rights
in good standing*

Appropriations may be made under the *Water Code* of (1) waters to which riparian or prior appropriative rights have not attached, and (2) waters claimed under existing appropriations, but either (a) not beneficially used, or (b) not in process of being put to beneficial use, according to the standards that govern the completion and exercise of appropriative rights. Such appropriable waters may comprise (1) water flowing in a natural surface channel or in a known and definite underground channel, (2) water in a lake or other natural body of water, and (3) water which after having been appropriated and used flows back into a stream, lake, or other body of water. (Secs. 1200 to 1202.)

*The water may be
in streams or
lakes or may be
return flow*

An appropriative right that is made of the water of a stream attaches to the *underflow*, and likewise, to the waters of all *upstream tributaries*.

Waters that have been lawfully *taken into possession* by a person under a valid right of use are his private property. Such waters may be flowing in an artificial ditch, or impounded in an artificial reservoir, or commingled with natural stream waters for purposes of transportation. They are not subject to appropriation by anyone else.

*Navigation comes
first*

Navigable as well as *nonnavigable* waters are subject to appropriation. Diversions of water from a navigable stream, however, are permissible only if they do not interfere with navigation on the stream. While the right of navigation is superior, as it is to riparian rights also, it will not be asserted so as to prevent the making of di-

versions by appropriators so long as enough water is flowing in the stream to accommodate the actual needs of navigation.

Who may appropriate water. *Any person*, even a riparian owner (see p. 18), may appropriate water under the Water Code. Such an appropriation also may be made by the United States, the State of California, or any entity or organization capable of holding an interest in real property in the state. (Secs. 1252 and 1252.5.)

Any person can appropriate water for use on a particular tract

Lands. Certain points concerning this topic are noted above under "Place of Use" (see p. 29).

It is not necessary that the appropriator shall own outright the land on which the water is to be used. Appropriations may be made by individuals on either public or private lands. A person who is in lawful possession of land—such as an entryman on public land, or a lessee of private land—may appropriate water for the irrigation of that land.

The appropriator need not own the land

The rules and regulations of the Department of Public Works pertaining to the appropriation of water require an applicant who does not own the land on which the water is to be used to show the arrangements that he has made with the owner for control of the place of use of the water (Calif. Dept. Pub. Works, "Rules, Regulations and Information Pertaining to Appropriation of Water in California," p. 14 (1952); Calif. Admin. Code, sec. 670 (k) (6)).

The appropriative right is *appurtenant* to the land on which the water is used. This means that it is attached to the land; but it is not inseparably attached.

When the irrigated land is sold, the appropriative right is included in the sale—unless the parties agree otherwise. That is, in conveying the land the water right may be reserved by the seller from the conveyance. Furthermore, the appropriator may sell his water right to one person and his land or his interest in the land to another person. Or he may sell the water right and keep the land. Or he may transfer the water right to other land of his own.

Such transfers of appropriative rights to other lands may be made only under certain conditions, noted below under "Changes in the exercise of appropriative rights" (see p. 32). Upon such a transfer, the right ceases to be appurtenant to the original tract and becomes simultaneously appurtenant to the new tract.

Handling of water. In the handling of appropriated water, *artificial control works* are in most cases necessary.

Artificial control works include dams and headgates; storage reservoirs; pumps, ditches, flumes, and pipes for

conveying the water to the place or places of use and distributing it there; and structures for controlling the flow of water through the system.

A natural channel may be used to convey water, where this can be done instead of digging a ditch for that purpose (Water Code, secs. 7043 and 7044).

An appropriator may turn his appropriated water into a stream in which it may be *mingled* with the water already flowing there, and may divert at a downstream point the quantity of water that he has turned in minus conveyance losses. A condition of exercising this privilege is that the quantity of water already in the stream to which others have rights shall not be diminished by the use of the stream as a carrier. (Water Code, sec. 7075.)

*He must handle the
water efficiently*

Reasonable efficiency is required by law in the operation of an appropriator's works for diverting, conveying, and distributing water, and in his methods of applying the water to the land. In determining whether his irrigation works and practices are reasonably efficient, the *standards generally accepted* in the community are taken as a general guide. That is, if the best local practices are to divert and convey water with the use of wood structures and earth ditches, an appropriator will not be required to install a masonry dam, concrete headgate, and cement-lined ditches or steel pipe. But even though the appropriator is not held to 100 per cent efficiency so that "the last drop of water" may be saved from loss, nevertheless it is necessary that his works be kept in a good state of repair and that his methods of applying water be such as to avoid unnecessary waste of water.

Rotation in the diversion of water may be practiced by appropriators. The courts also have authority, in settling water controversies among appropriators, to impose rotation plans upon these appropriators without their consent if this will result in a better use of the stream and at the same time will not impair the priority or the extent of any of the water rights in the stream.

*Some changes in
using the right
may be made*

Changes in exercise of rights. Changes may be made under certain conditions in some of the elements of an appropriative right, but without altering the fundamental features of priority and quantity of water.

The principal changes that may be made are in (1) the *point of diversion*, (2) the *place of use*, and (3) the *purpose of use* of the water.

So far as appropriations made under the *Water Code*, or the *Water Commission Act* which preceded it, are concerned, changes in these features may be made only by following a prescribed procedure (Water Code, secs. 1700 to 1705).

The applicant, permittee, or licensee under the Water Code who wishes to make one of these changes must petition the Department of Public Works for permission to do so. If the Department requires it, the petitioner must give notice. If the proposal is protested, a hearing is held. The Department grants or refuses permission to make the change, depending upon the circumstances. But the Department may grant the permission only if it is satisfied that the change will not injure any other lawful user of water of the same source of supply.

A person who holds an appropriation of water *other than under* the Water Code or the Water Commission Act is likewise authorized to make such changes, and to extend his conveyance works to places beyond the first place of use (Water Code, sec. 1706). There is no formal procedure for making such changes, and the permission of the Department is not required. The only limitation is that others shall not be injured by the change.

Changes may also be made in an appropriator's *irrigation works*. These include the method of diverting water, and the location and character of the conveyance and distribution conduits and structures. A necessary condition is that no injury shall result to other holders of water rights.

Relative rights of appropriators. In a controversy between appropriators, the ones with the earlier priorities are called *senior* or *prior appropriators*, and those with later priorities are *junior* or *subsequent appropriators*.

The *senior appropriator* is entitled to the use of all of the water naturally flowing in the stream, to the extent of his appropriative right, in preference to any use by any junior appropriator. This is the case, regardless of whether the senior appropriator's headgate is upstream or downstream from those of later appropriators. If a junior appropriator diverts water upstream from a senior, it must be done with no material diminution in the quantity or material deterioration in the quality of water available to satisfy the senior's rights.

The fact that heavy losses of water may occur in the bed of a stream between the headgate of a junior appropriator and the downstream headgate of a senior appropriator does not affect the superior right of the latter. If he can make beneficial use of whatever quantity of water would reach his headgate under natural conditions, undisturbed by later appropriators upstream, he is entitled to it.

The *junior appropriator*, however, has rights that must be respected by those senior to him. Granted that senior rights must be fully satisfied first, when this has been

*The Senior right
must be fully
satisfied*

*but the junior's
rights must be
respected*

done the junior appropriators are entitled to the use of all *surplus* waters, in the order of their priorities, to the extent of their several rights. Surplus waters in this connection comprise all waters in excess of the quantities required to satisfy all prior rights. Surplus waters may be present in the stream at one time and not at another time. When they do occur, junior rights attach to them.

Junior appropriators are also entitled to divert quantities of water covered by prior rights during such times as the senior appropriators are not making use of those quantities. No one is entitled to divert, at any time, water that he does not need at that particular time, despite the fact that his right may entitle him to divert a greater quantity *when he needs it*. When he does not need the water, junior appropriators benefit.

*Additional water
means a new
appropriation*

A senior appropriator *cannot enlarge his right* at the expense of a junior appropriator. If the first appropriator on a stream wishes to divert water in addition to the quantity covered by his original right, he must make a new appropriation of the additional quantity. This new right will have a priority as of the time the right is acquired, which necessarily will be junior to that of any intervening appropriator. This does not prohibit an appropriator from developing his original project gradually, with reasonable diligence, as noted on page 26-27.

*Changes that hurt
someone else
can't be made*

An appropriator is entitled to have the *stream conditions remain substantially as they were* when his appropriation was made, so far as the activities of other appropriators are concerned. This means that an appropriator may insist that another appropriator shall not change the exercise of his right to the injury of the former. The junior appropriator is entitled to this protection against a senior appropriator, as well as a senior against a junior.

Loss

*The right may be
lost*

There are four ways in which one may lose his appropriative right, as follows:

by abandoning it

1. Abandonment. An appropriative right may be *abandoned* by voluntarily discontinuing the use of the water with the intention of giving up the right permanently. It is necessary that the *intent* shall concur with the *actual relinquishment* of possession of the water and of the right. When they do concur, abandonment takes place instantly.

Nonuse of the water is not, of itself alone, an abandonment. Nor does abandonment depend upon nonuse for any particular length of time. Nonuse for a long period of time may be an *indication* that the owner of the right intended to abandon it, but that is only a pre-

sumption that may be disproved by evidence that no such intention existed.

2. Forfeiture. The appropriative right is *forfeited* by the failure of the holder to use the water, for the purpose for which it was appropriated or for another purpose to which the right has been lawfully transferred, for a period of years prescribed by law.

*by not using it
for three (or five)
years*

The *Water Code* provides that the period of nonuse that will result in forfeiture of the right shall be *three years* (sec. 1241). This time period was prescribed by the Legislature in an amendment to the Water Commission Act in 1917. It applies at least to appropriations made, after the date of the amendment, under the Water Commission Act or the Water Code.

The *Civil Code* had provided in 1872 for the forfeiture of appropriative rights but had not prescribed any period of time (sec. 1411). The courts decided that the period should be *five years*, which was the same time period as that fixed by statute for the loss of a water right by prescription. Whether the loss now of any of these earlier rights of use of the water of watercourses would depend upon three years' nonuse or five years' nonuse has not been specifically decided by the California Supreme Court.

3. Prescription. An appropriative right may be lost as the result of adverse diversions of water that ripen into a *prescriptive right* against the appropriator.

To cause loss of the right, these diversions must have been made under certain conditions prescribed by law for the acquirement of prescriptive rights. Under ordinary circumstances prescription results from upstream diversions only.

If the appropriator fails to interrupt the adverse diversion by persuasion or by physical means or by the filing of a court action that proves to be successful, then at the end of the five-year period he loses his right to object to it. The adverse diversion has then ripened into a prescriptive right that is superior to any further claim that the appropriator may make to the use of the water.

*by failing to
prevent adverse
use*

4. Estoppel. An appropriator's conduct toward another person may be such as to result in a court order prohibiting him from asserting a right superior to the right of the latter. This may come about, for example, where the appropriator, knowing his representations to be false, induces another person to proceed with the development of a water supply in the belief that the water supply will be adequate and his water right good. Having done that, the appropriator is *estopped* or forbidden by the court from asserting that his own water right is superior to that of the person whom he has misled.

*or by court order
if others have
been misled*

Before a person will be estopped from asserting his right, it must appear that his conduct has been inequitable, or fraudulent. He must have been guilty of misleading statements or acts, or of concealing facts by silence when he was under a duty to speak. Mere silence, if one is under no duty to speak, is not ground for estoppel. And it is necessary that the other party must have been ignorant of the true state of facts and must have acted, to his injury, upon the appropriator's misrepresentations.

Part of an appropriative right may be lost in any of the above ways, without the loss of the remaining portion of the right.

THE PRESCRIPTIVE RIGHT

Acquiring

A right can be established by taking water five years IF . . .

A *prescriptive right* is acquired by diverting and putting to beneficial use, for a period of five consecutive years, water to which some other party or parties have prior claims, thereby depriving the rightful water-right owners of their use of the water or of the possibility of using it. The five-year period is prescribed by the State statute of limitations.

The law prescribes *certain conditions* that must be fulfilled by the claimant of an adverse or prescriptive right before he may successfully assert it and thereby take away from the injured party his lawful water right. The essential conditions are:

it is done openly

1. The diversion of water by the prescriptive claimant must have been made *openly*, without any attempt at concealment.

the act is against someone else's interest

2. His diversion of water must have been *adverse* or *hostile* to the right of the appropriator or riparian owner which he is invading. This means that the appropriator or riparian owner must have been deprived, because of the adverse diversion, of the use of his water to such an extent that he could have successfully maintained a court action to stop the unlawful interference with his right.

water that someone else claims and needs is taken

3. The rightful owner—that is, the appropriator or riparian owner whose lawful right is being invaded—must have been *excluded* by the adverse claimant from the use of the water during the times at which he had the right to use it.

it is done with no interruption

4. The adverse diversion must have been made without any actual *interruption* on the part of the rightful owner.

it is done under claim of right

5. The adverse claimant must have made his diversion under a *claim of right*. This requirement would be satisfied, for example, if an appropriator is seeking to acquire a prescriptive right against a riparian owner, or a junior appropriator against a senior appropriator—in either case

asserting openly his own appropriative right. If any taxes have been separately assessed against the water right of the rightful owner, the prescriptive claimant must have paid them.

6. The prescriptive claimant must have diverted the water, not incessantly, but *whenever he needed it* throughout the five-year statutory period.

The diversions of water by the prescriptive claimant during the prescriptive period are *unlawful*. This is necessarily the case, because he is invading the valid prior right of someone else, and is subject to a court injunction if the rightful holder seeks one. But if these unlawful practices continue without interruption for five consecutive years under the conditions outlined above, they *cease to be unlawful* as against the injured party. The adverse claimant, at the end of the statutory period, acquires a *prescriptive right*—a superior right—against the person whose right he has invaded. This right, when perfected, is in the eyes of the law as valid as if it had been acquired by deed from the true owner.

During the five-year prescriptive period the rightful owner of the water right may be able to *break the continuity* of the adverse use. Continuity is broken if the adverse user, upon the insistence of the rightful owner, releases the water that he demands. This also occurs if the rightful owner effectively prevents the diversion by physical means. And it results if he initiates a successful legal action to restrain the continuance of the adverse diversion and use. To break the continuity of the adverse use, it is not necessary that judgment in such a lawsuit be rendered before the prescriptive period expires; but it is necessary that the suit be filed during the prescriptive period and that it be prosecuted to a successful conclusion. If the continuity of adverse use is broken in any of these ways, the running of the statute of limitations is stopped and the prescriptive right consequently does not mature.

But if the rightful owner *fails to interrupt* the adverse use before the end of the five-year prescriptive period, he thereupon loses his right to object to it. The prescriptive right, upon the conclusion of the statutory period, vests against him.

Upstream diversions. In the usual case, a prescriptive right may be acquired only against *downstream* riparian owners or appropriators. This is because a water right is seldom infringed by any use of the water of a stream that is made after the water has flowed downstream past the headgate or land of the holder of the right.

There are exceptions to this rule—for example, where

*and it is done
whenever water is
needed*

*“Prescription does
not run upstream”*

a person locates his diversion and part of his ditch upon upstream land, without the consent of the landowner, in order to divert water there for use on downstream land. The general rule, however, is sometimes expressed thus: "Prescription does not run upstream."

An appropriator
may acquire such
right

or a riparian
owner may do so

Who may acquire a prescriptive right. The right of an *appropriator* of water may become prescriptive against either prior appropriators or riparian owners.

A *riparian* owner may acquire a prescriptive right, in addition to his normal riparian right, against the rights of downstream riparian lands. It is necessary, however, that the upstream riparian owner, in making his diversion of water, shall bring home to the downstream owners notice that he is diverting more than his share of the water, that he is claiming a right to make the excessive diversion, and that the diversion of the excess is adverse to their interests.

Utilizing

This right must be
used in the way it
was acquired

The holder of a prescriptive right may continue to exercise it under the *same conditions* that prevailed while the right was being acquired.

The quantity of water to which a prescriptive right relates cannot exceed the quantity that was used throughout the full five-year statutory period. A prescriptive claimant who enlarges his use of the water during the period is entitled, at the end of the period, to only the quantity that he has used for five years. The right to the excess does not mature until it also has been used for five years.

The right to make any change in the exercise of a prescriptive right is limited by the usual condition that the rights of other persons shall not be impaired by the change.

Loss

A prescriptive
right can be lost

The prescriptive right may be lost in the same manner as that in which it was acquired—by *prescription* on the part of another person.

An appropriative right that has become prescriptive may be lost in any of the ways in which appropriative rights generally may be lost. That is, the fact that it has become prescriptive does not render it less immune from loss than it was before.

RIGHTS TO STORE WATER

Water can be
appropriated for
storage

Water may be *appropriated* for *storage* in reservoirs pending later use, as well as for diversion for immediate use.

An application to appropriate water under the Water Code that contemplates reservoir storage must describe the reservoir by location, height of dam, capacity of the reservoir, and use to be made of the impounded waters (sec. 1266).

An appropriation of water to be stored in the ground for later recovery and use may also be made under the Water Code (sec. 1242). This includes the diversion of streams and the flowing of water on lands for such purpose, commonly known as “water spreading.”

A *riparian owner* may not store water for future use by virtue of his riparian right. His riparian right entitles him to detain water temporarily in forebays or small reservoirs for immediate use in the development of hydroelectric power. But it does not entitle him to store water from one year to another, or from a wet season to a dry one. To do this, he must make an appropriation of the water for storage purposes.

*Riparian water
can't be stored
for later use*

CONFLICTS OF WATER RIGHTS IN WATERCOURSES

Lawsuits over water rights in which only appropriative rights are involved are decided according to the principles and rules of the *appropriation doctrine*. If only riparian rights are at issue, the *riparian doctrine* governs. And if the rights in controversy are both appropriative and riparian rights, *both doctrines* must be taken into account in adjusting the conflicts.

*In conflicts,
which right is
superior?*

Relative Superiority of Rights

The *pueblo water right* is superior to the rights of all riparian owners and appropriators on the same stream. The pueblo water rights of Los Angeles in Los Angeles River, and of San Diego in San Diego River, have been established by decisions of the California Supreme Court.

In conflicts between *appropriative* and *riparian* rights,¹ certain appropriative rights may be superior to certain riparian rights, and vice versa. The question of relative superiority depends upon several factors—chiefly the respective times of accrual of the rights, and whether the appropriation was made on public or private land. If the appropriation was made on private land, the relative locations of diversions on the stream in certain cases are decisive. The relationships are as follows:

*Riparian rights
begin with
private ownership*

When public lands contiguous to streams pass to private ownership, they become possessed of riparian rights at that time. That is the time when the rights accrue, or come into existence. Appropriative rights accrue when the appropriations are made.

Riparian rights of lands contiguous to streams are *inferior* to appropriative rights (on the same streams) that were acquired on public lands before the riparian lands passed to private ownership. Riparian rights are *superior* to appropriative rights acquired subsequently on public lands.

Riparian rights are *superior* to appropriations made subsequently on private lands, whether upstream or downstream. They are also *superior* to earlier appropriations made on downstream private lands. Whether they are superior to earlier appropriations made on upstream private lands has not yet been decided by the California Supreme Court.

This means that if on a particular stream certain appropriative rights are superior, they must be satisfied out of the stream flow before the inferior riparian lands are entitled to any use of the water. If the riparian rights are superior, then their use of the water comes first, and the inferior appropriative rights have recourse only to the surplus water, if any, after the needs of the superior riparian rights and of any earlier appropriative rights on the stream are fully satisfied.

Quantities of Water

Ways of settling
quantities differ
with the rights
involved

In the settlement of any conflict, each *appropriative right* is allotted a specific quantity of water. In conflicts between *riparian owners only*, the allotments usually are made on a proportional basis. When *appropriative and riparian rights* are in conflict, the owners of those riparian rights that are superior must first show what their reasonable water requirements are with respect to areas of land and quantities of water, and the holders of inferior appropriative rights must then show that there is a surplus in the water supply available for their use. These inferior appropriative rights attach only to the surplus.

Reasonable Beneficial Use

All water rights in California, by reason of the constitutional amendment of 1928 (see p. 12), are now limited to what the courts have termed *reasonable beneficial use of water*.

ALL users must use
water reasonably

This means that in the adjustment of conflicts between the users of water of watercourses, *all claimants*, whether riparian or appropriative, are held to *reasonable beneficial uses* of water under reasonable methods of diversion and use. Practices that prevail generally in the community are given considerable weight in setting the *immediate standards* by which reasonableness is determined in such a controversy.

Physical Solution

The courts in some cases adopt *physical solutions* of water-rights controversies. A physical solution—for example, making available a substitute supply of water at no increase in cost to the prior user—protects a downstream superior or prior right, without enjoining the exercise of an upstream inferior or junior right, or requiring the upstream parties to buy out the superior rights downstream.

*Substitute supply
to a prior user
may avoid waste*

This type of adjustment of water controversies has come about because in certain situations the settlement of conflicting water rights in strict accordance with the relative superiority or priority of the rights might result in a substantial waste of water, which is against the State water policy. For example, to require water to flow in its natural course for a long distance in order that the holder of a superior or prior right shall receive his full supply at his point of diversion may necessitate the loss of a large quantity of water in conveying a relatively small quantity to that point.

The right of an appropriator or riparian owner to receive his water supply in the quantity and quality and at the times nature provides is a property right, of which he may not be deprived arbitrarily. However, to supply him at his place of use an equivalent quantity of water of the same quality and during the same period of use, at no greater expense to him than he has been incurring, is not to deprive him of any part of his property right.

The courts have authority to accept physical solutions agreed to by the parties to water controversies, and to impose physical solutions upon them if they cannot agree, provided that the superior or prior rights are fully protected. The purpose of physical solutions is to avoid unnecessary and unconscionable waste of water and at the same time protect existing rights of use.

*but all rights
must be protected*

Water rights in

DEFINITE UNDERGROUND STREAMS

The rules of law that govern water rights in surface watercourses apply equally to watercourses under the surface. Therefore, rights of use may be either *riparian rights* or *appropriative rights*. *Prescriptive rights* may vest against riparian owners or appropriators, just as in the case of surface streams.

*Laws about surface
streams apply to
underground ones*

The *underflow* of a surface watercourse is a part of the watercourse. Rights of use that attach to the surface stream

attach equally to its underflow. Persons who hold superior or prior rights of use in a surface stream are entitled to protection against abstractions of water from the underflow that would result in depleting the surface flow.

RIPARIAN RIGHTS

Riparian rights attach to them Lands that overlie *definite underground streams* have *riparian or overlying* rights in their waters solely by reason of the situation of the lands with respect to the water supply.

The *underflow* of a stream may not only lie immediately beneath the surface stream, but may extend for considerable distances beyond the surface banks on one or both sides. A tract of land therefore may overlie the underflow of a stream without being contiguous to the surface stream itself. Such land has a riparian or overlying right in the underflow. But that right does not entitle the owner to divert water from the surface stream to the injury of owners of land riparian to the surface channel, even if the owner of the intervening land grants him a right of way. His access to the water by reason of the location of his land is downward through the soil, and his right may be exercised by pumping from the ground.

APPROPRIATIVE RIGHTS

The waters can also be appropriated The waters of *definite underground streams*, including the *underflow* of surface streams, may be *appropriated* in the same manner and under the same limitations as in the case of surface watercourses. Such a right acquired in the underflow relates to the entire watercourse, surface and subterranean, and is junior to all appropriative rights previously acquired in any part of the watercourse.

The Water Code makes the current appropriative procedure specifically applicable to "subterranean streams flowing through known and definite channels" (sec. 1200).

Water rights in

PERCOLATING GROUND WATERS

Some laws deal specially with percolating water In California water law, waters in the ground that are not moving in definite underground streams are *percolating waters*. The waters of a *common artesian basin* that are broadly diffused are classed as percolating waters in determining rights of use, provided that the physical characteristics of a definite underground stream are not present.

Originally, rights of use of percolating waters were governed by rules that were entirely different from those applicable to definite underground streams. Changes that have taken place in the law during the past fifty years have considerably lessened the differences, so that the rights that pertain to waters of the two classes are now in many respects alike. Nevertheless, in any consideration of California ground-water law, it is necessary to keep these two classes of ground water distinct.

Rights to the use of percolating ground waters consist of *correlative rights* and *appropriative rights*. Against either, *prescriptive rights* may vest.

THE CORRELATIVE RIGHT

Analogy to the Riparian Right

The *correlative right*, like the riparian right, exists solely by reason of the situation of the land with respect to the water supply. Land that borders a surface stream is riparian land and has a riparian right in the water of the stream, while land that overlies a body of percolating water is overlying land and has a correlative right in the water of that ground water supply. Title to riparian and correlative water rights is acquired in the same way—by acquiring title to the land. The rights of overlying owners as against each other, and of riparian owners as against each other, are based upon the same reciprocal principles, and the landowners in the two groups have the same fundamental rights as against appropriators. Neither right is forfeited solely by disuse, but can be lost by adverse use on the part of others under circumstances that result in the vesting of prescriptive rights.

Overlying land has a correlative right

Relative Rights of Overlying Landowners

The owners of lands that overlie a common ground water supply, whether artesian or nonartesian, have *co-equal* rights to the use of the water on or in connection with their overlying lands. For such purpose, the right of each landowner extends to, but to no more than, the quantity of water required for *reasonable beneficial use*.

All overlying owners have coequal rights

The correlative right, like the riparian right, is not subject to forfeiture solely by disuse of the water. No overlying landowner can acquire *exclusive* or *paramount* rights as against any other owner solely because he began to use the water first, or because of the nonuse of others, or for any reason other than grant, condemnation, or prescription. Each owner can begin his reasonable use of the water at pleasure.

None has priority because he used water first

If the common supply of percolating water is not adequate for the needs of all overlying lands, each landowner

Courts may
apportion

is entitled to an *equitable portion*. The courts have power to make such apportionments and to enforce them by their judgments and decrees.

Place of Use

The correlative right entitles the holder to use the water only on or in connection with his *overlying land*, just as is the case with the riparian right. Nonoverlying uses of the water are appropriative, and may possibly become prescriptive as well.

Loss

A correlative
right can be lost
by prescription

The correlative right may be lost by adverse use that ripens into *prescription*.

The essential requirements of prescription with respect to the waters of surface watercourses apply to percolating waters as well. However, the general statement that “prescription does not run upstream” does not have the same application to percolating waters as to stream waters. This is because of differences in the movements of stream and percolating waters—the one flowing over the soil and the other moving through the spaces between the soil particles—and the resulting response of percolating water to pumping operations in the area.

but not solely
by nonuse

Forfeiture of water rights because of nonuse of water does not apply to correlative rights in percolating waters.

THE APPROPRIATIVE RIGHT

Water

Surplus
percolating water
can be appropriated

The overlying landowner’s correlative right is limited to reasonable beneficial use not only as against other overlying landowners but against all other claimants as well. *Any surplus* in a supply of percolating water above the aggregate quantities required for the reasonable beneficial use of the overlying lands may be *appropriated*.

Acquiring

but only by
withdrawing and
using it

An appropriation of percolating water may be made only by acts of withdrawing the water from the ground, conveying it to the place of use, and using it.

The procedure in the Water Code for the appropriation of water *does not apply to percolating water*. That procedure applies only to surface water, and to subterranean streams flowing through known and definite channels (sec. 1200). Necessarily that excludes percolating water.

The fact that percolating water may be appropriated only by diversion and use, and not under the procedure prescribed in the Water Code, does not in any way affect the validity of the appropriative percolating water right. However, as the Water Code does not provide procedure

for filing and recording claims of such rights (with the exception of certain southern counties, as noted on p. 46), it is advisable that the appropriator keep complete and accurate records of his operations in order to preserve specific data for eventual use in protecting and adjudicating his right. (See Calif. Dept. Pub. Works, "Rules, Regulations and Information Pertaining to Appropriation of Water in California," p. 38 (1952).)

If this is done, a record should be kept

Utilizing

An appropriation of surplus percolating water may be made for *distant use*—that is, use on or in connection with lands away from the water-bearing ground water area. This is a common type of nonoverlying use.

Such water may be used outside the area

Public-utility use likewise is a nonoverlying use, wherever made. A public-utility company or a city that pumps percolating water for the service of the public and delivers it to overlying landowners for compensation is not thereby exercising correlative rights of its own or of the overlying landowners. Such public use of percolating water, whether within or outside the ground water area, is made in the exercise of appropriative rights only. These appropriative rights in time may vest by prescription against the overlying landowners.

Public-utility use of such water is appropriative only

The exercise of appropriative percolating water rights, as well as all other water rights in California, is limited to *reasonable beneficial use* under reasonable methods of diversion and use.

The use must be reasonable

Loss

The right may be lost by abandonment, prescription, or estoppel, as in the case of appropriative rights in water-courses.

Appropriated percolating water rights can be lost

However, the provision in the Water Code (sec. 1241) for the forfeiture of water rights not beneficially used for three years does not apply to percolating waters. The period of nonuse of water that subjects an appropriative right in percolating water to loss by forfeiture is five years.

PRESCRIPTIVE RIGHTS

Uses of percolating waters may become *prescriptive* against the rights of overlying landowners and of prior appropriators, if made adversely for five years under all the circumstances necessary to establish prescription. Prescriptive rights may be established either within the ground water area or outside of it.

Prescription must be adverse to another's right

Appropriative uses of surplus percolating water—that is, waters in excess of the reasonable beneficial requirements of overlying landowners and prior appropriators—are not wrongful, and therefore cannot become prescrip-

tive. It is only unauthorized uses of nonsurplus water that are adverse to existing rights and that hence may ripen into prescriptive rights.

**CONFLICTS OF RIGHTS
IN PERCOLATING WATERS**

*Overlying land has
first rights*

In the absence of prescription, the right of the *owner of overlying land* to make reasonable beneficial use of the percolating ground water in his land is *paramount*. Appropriators for distant use or for public-utility use may take only the surplus above the proper requirements of the overlying owners, if and when there is a surplus. In the event of a shortage of water, the rights of appropriators must yield to those of the overlying owners, the available supply to be divided among the overlying owners equitably under all the circumstances.

**RIGHTS IN OVERDRAWN
GROUND-WATER SUPPLIES**

*Water in overdrawn
supplies may be
apportioned*

A ground-water supply is *overdrawn* when the average annual withdrawals in the area, by pumping or otherwise, exceed the safe yield, or safe annual replenishment from the sources that provide the area with its supply of ground water. A continuing overdraft is accompanied by a general lowering of the water levels from year to year. If continued indefinitely, the water users eventually would be unable to obtain enough water for their established uses.

The California Supreme Court held in the case of *Pasadena v. Alhambra* (33 Calif. (2d) 908, 933, 207 Pac. (2d) 17), decided in 1949, that prescriptive rights against both overlying landowners and prior appropriators in the Raymond Basin had been established by appropriations made after the commencement of the overdraft. Even after the overdraft had begun, all parties continued to pump. Hence no water rights had been completely lost and none had been completely gained by prescription. The court ordered the pumping by all parties to be proportionately reduced, the total annual pumpage not to exceed the safe yield.

Overdrafts upon ground-water supplies have led to the enactment of two recent statutes pertaining to ground-water rights in certain counties only:

1. In any of the counties of Santa Barbara, Ventura, Los Angeles, Orange, San Diego, Imperial, Riverside, and San Bernardino, the water right of a ground-water user will not be impaired by ceasing or reducing his extraction of ground water if he uses instead water from an alternate source that is not tributary to the ground-water supply.

Reports must be filed with the Division of Water Resources, Department of Public Works. (Water Code, secs. 1005.1 and 1005.2.)

2. In Riverside, San Bernardino, Los Angeles, Ventura, and Santa Barbara counties, extractions of ground water in excess of 25 acre-feet per year, with certain exceptions, must be reported to the Division. Diversions of surface water by such ground-water users must also be reported. Persons required to file the reports who fail to do so cannot base prescriptive rights upon uses of ground water during periods for which reports are not filed. (Water Code, secs. 4999 to 5008.)

Regulations applying to

WATER WELLS

Report of Completion

Every person who installs, deepens, or re-perforates a water well is required by the Water Code to report completion of the work to the appropriate regional water pollution control board (secs. 7076 to 7078).

Any work done on water wells must be reported

Installation of the well comprises digging, boring, or drilling. The report is made on forms furnished by the Division of Water Resources. It must be filed within 30 days after the construction or repair of the well has been completed. Failure to comply with the statute is a misdemeanor.

The statute applies also to certain oil or gas wells converted for use as water wells.

Waste from Flowing Artesian Wells

The Water Code contains provisions aimed at the *prevention of waste* of the water of *flowing artesian wells* (secs. 300 to 311). The statute applies to any artificial hole in the ground through which ground water naturally flows to the surface for any length of time.

Flow from artesian wells must be controlled

Any flowing artesian well not equipped with a mechanical device which will control the flow is declared to be a public nuisance, and the person responsible for its continued existence is guilty of a misdemeanor. Any person responsible for the waste of water of flowing artesian wells likewise is guilty of a misdemeanor. Penalties for violation of the statute are prescribed.

Water rights in

SPRING WATERS

The *source* of a spring is *ground water*. The waters of a spring are simply ground waters that have risen naturally to the surface at that particular place.

<p><i>The landowner may use spring water that does not flow from his land</i></p>	<p>The water of a spring that <i>does not flow from the tract</i> on which the spring is located, either on the surface or beneath it, is subject to the use of the landowner. Other persons may share in the rights to the sources of the spring, but they have no concern with the landowner's use of the water after it reaches his spring.</p>
<p><i>But if it does, others share the rights to it</i></p>	<p>The rights of the landowner in a spring that <i>flows from his tract</i>, however, are qualified by the rights of others in the water supply of which the spring water becomes a part. If the spring <i>flows into a watercourse</i> it becomes a part of that watercourse, and the owner of the land on which the spring rises has only the right of a riparian owner. The water of such a spring may be appropriated in the same manner and to the same extent as any other part of the watercourse. If the spring water <i>sinks into the ground</i> and becomes part of a supply of percolating water, the landowner has the correlative right of an overlying landowner.</p>
<p><i>The right to spring water can be lost</i></p>	<p>Rights in the waters of a spring that do not flow from the land <i>may be lost</i> by prescription. The respective ways in which rights in springs that flow from the land may be lost are those that pertain to watercourses and ground waters.</p>

Water rights in

INTERCONNECTED WATER SUPPLIES

<p><i>Rights to a common supply must be correlated</i></p>	<p>Water supplies that are interconnected—so that, for example, one water supply is replenished from another one and contributes water to a third supply—are considered in California to comprise one common water supply. Rights to the use of the various parts of the common supply are correlated when controversies over them arise.</p>
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SPRING AND CONNECTED WATER SUPPLIES

<p><i>Springs and their sources</i></p>	<p>A <i>spring</i> and its source and outlet provide an example of an interconnected or common water supply.</p> <p>If the spring <i>does not flow from the tract of land</i> on which it is located, and if there is no evidence of a subterranean outlet by which the spring water that sinks into the ground leaves the tract, the owner of the tract and the owners of lands overlying the ground water which is the source of the spring have correlative rights of reasonable beneficial use in the common supply. The over-</p>
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lying owners may extract from the ground no more than their reasonable shares of the percolating water that feeds the spring if the result is to deprive the owner of the land containing the spring of his reasonable share of the aggregate water supply.

A spring that *flows from the land*, either on or under the surface, adds another element to the problem, namely, the water supply to which the spring makes its natural contribution. This may be a watercourse, or it may be a body of percolating water. In this case the holders of rights of use of the common supply comprise (1) the owners of lands overlying the ground water that feeds the spring, (2) the owner of the land on which the spring rises, and (3) the holders of riparian and appropriative rights in the stream into which the spring flow is discharged, or the owners of lands overlying the ground water supply to which the spring is tributary and appropriators of the water, as the case may be. All of these rights are likewise coördinated on the same basis of reasonable beneficial use.

*and streams that
flow from them*

SURFACE WATERS AND GROUND WATERS

The physical interconnection of *surface waters* and *ground waters* is pronounced and widespread. Springs derive their entire water supplies from the ground, and watercourses are fed in part from that source. Ground waters, in turn, are supplied not only directly by rain and melting snow, but also by diffused surface waters, spring waters, and percolation from surface watercourses.

*Streams and
percolating waters*

The major water supplies of California are surface streams and percolating ground waters. In many situations these supplies are directly and closely related. There is in the state a high degree of coördination of rights in these interrelated water supplies.

From the standpoint of rights of use, the surface and ground waters that feed a watercourse, the surface flow and underflow of the stream itself, and the ground waters that break away from the stream, are considered a common source of water supply. Certain water rights attach directly to the separate parts of the common supply, but they are nevertheless related to the water rights in the other parts. For example, owners of lands that overlie percolating water that feeds a stream are limited to reasonable use of the water not only as among themselves, but also in consideration of the rights in the stream itself. And the rights in the stream are qualified likewise by rights in percolating waters that have escaped from the stream and of which the stream therefore is the source.

MAIN STREAM AND TRIBUTARY SOURCES

*Upstream
tributaries with
their main streams*

The holder of a water right in a watercourse has rights in the waters of streams, lakes, sloughs, springs, and ground waters that join the stream above his point of diversion. *Upstream tributaries* are all part of his source of water supply. If this were not the case, the waters of the main stream might be so depleted by diversions from tributary sources as to impair or destroy the water rights in the main stream.

Water rights and

IRRIGATION ORGANIZATIONS

IRRIGATION DISTRICTS

The privilege of obtaining water from an *irrigation district* is conferred upon the holders of lands included within the boundaries of the district and assessed for the benefits received from its operation. Each landowner is entitled to a proportionate part of the total water supply, based upon his proportion of the total district assessment. The district, however, in lieu of part or all of its assessment, may levy tolls or charges which must be paid by those who wish to use the water.

An irrigation district may *appropriate* water for the service of lands within its boundaries.

*A district may
appropriate water
for its lands*

An irrigation district may be formed to serve lands the owners of which hold individual appropriative rights. In that case, if the district does not purchase or condemn these appropriative rights, it may deliver water to the owners according to some equitable arrangement.

*or act as agent
in delivering
water*

As *riparian rights* are held only by the owners of riparian lands, any riparian rights that may pertain to lands within an irrigation district (other than lands owned by the district itself) belong to the landowners, not to the district. The district and the riparian landowners, however, may contract for the delivery by the district to the landowners of the water to which the latter are entitled under their riparian rights. The district in doing that is the agent of those landowners.

MUTUAL IRRIGATION COMPANIES

The members of a *mutual irrigation company* are the owners of its properties. Because of their several interests in the company, the members are entitled to receive water

from the company system. If the company is incorporated, the interests of the members are represented by the holding of shares of its capital stock. California has many incorporated mutual irrigation companies, and there are various arrangements for the relation of shares of stock to acres of land, for assessments against the stock shares, and for toll charges for the delivery of water. The water privilege of the member of an unincorporated company is stated in his contract with the other members. With the larger companies at least, this is in the form of written articles of agreement. Generally, the share of stock in an incorporated company entitles the holder to a proportionate part of the total water supply, unless otherwise provided in the articles of incorporation, bylaws, or stock certificates.

A mutual company is owned by those it serves

A mutual irrigation company may *appropriate* water for delivery to its shareholders. In that case the company holds formal title to the water right, but the shareholders have a beneficial ownership in it. Or the shareholders may hold appropriative rights individually, the company acting as their agent in exercising the rights.

It may hold title to water rights or act as agent

A mutual irrigation company does not hold *riparian rights* for any lands unless it holds title to the lands. In some mutual companies, shareholders who are riparian owners have made the companies their agents in diverting and delivering to them the water which they have individual rights to divert.

COMMERCIAL IRRIGATION COMPANIES

The holders of contracts with a *private-contract irrigation company* have such water privileges as are expressed in the contracts. These agreements specify the lands to be served with water by the company, the quantities of water to be delivered, and the annual charges to be paid by the irrigator to the company.

A *public-utility irrigation company* is required to serve water to lands within its service area, so far as the water supply permits, upon the payment of reasonable rates regulated or subject to regulation by the State Public Utilities Commission.

A commercial irrigation company of either type may *appropriate* water for service to its contracting parties or consumers. These persons, upon establishing relations with the company, acquire a beneficial interest in the water right to which the company holds formal title. A public-utility company that pumps ground water for the service of the public is regarded as an appropriator, even though part or all of its consumers are the owners of overlying lands.

A commercial company may appropriate water for consumers

DETERMINATION

of water rights

*Many water rights
are now
well recognized*

A water right is never established as against the holders of other water rights in the same source of supply—in the absence of binding agreements by the parties—until it has been *adjudicated* or *determined* in a court decree with respect to such other rights. On most California streams, however, it is probable that water rights have become so well recognized through use, or so well clarified by past litigation or by permits to appropriate and licenses issued by the Department of Public Works, or in some cases by agreements, that there is little local controversy regarding them.

The procedures for determining water rights in California are as follows:

ORDINARY CIVIL ACTION

*To determine
one's water right,
one may bring
civil suit*

The water right may be determined in a *civil lawsuit* in which there is *no participation by State officials*. There may be only two parties to such a suit, or there may be many parties. In any case, the judgment and decree at the conclusion of the action will bind only those persons who are parties to the litigation, and no others.

COURT-REFERENCE PROCEDURE

*Courts may refer
suits to the
Department*

The Water Code authorizes courts of the State to refer suits for the determination of water rights to the Department of Public Works, acting through the State Engineer, as referee. Such *reference* may cover any or all of the issues involved in the suit, or may call for an investigation and report upon any or all of the physical facts involved. The Department may similarly accept references of water rights suits from federal courts. (Water Code, secs. 2000 to 2076.)

The purpose of the court-reference procedure is to enable the trial courts to avail themselves of the technical advice and assistance which the State Engineer's organization can render in the solution of controversies over water rights, which so often involve complicated physical and legal problems.

STATUTORY ADJUDICATION

*All rights in a
stream system may
be settled in one
proceeding*

The Water Code contains procedure under which all of the water rights that pertain to a stream system can be *finally determined and adjudicated in one comprehensive proceeding* (secs. 2500 to 2900).

A *stream system* to which this procedure applies includes a stream, lake, or other body of water and its tributaries and contributory sources, including definite underground streams. It *does not apply* to percolating ground water.

The first part of the proceeding consists of an *administrative determination* of the water rights by the Department of Public Works, acting through the State Engineer, upon a petition signed by one or more claimants of the water rights. The Department makes an investigation, takes proofs from claimants of water rights, hears contests by those who object to statements in the proofs, and makes a determination of the water rights. Each person who has filed a proof of claim receives a copy of the order of determination. This administrative determination is a preliminary proceeding. There is no final action on the water rights until the determination has been heard and passed upon in court.

The Department makes a determination; files it in court

The Department files its order of determination and all testimony taken by it with the clerk of the superior court of the county in which the stream system or some part of it is located. Any party interested in the determination may file exceptions to the order of determination. The court holds a hearing on all exceptions filed. At the conclusion of the proceeding, the court enters a *judgment and decree* which determines and *adjudicates* the water right of every person involved in the proceeding. Appeals may be taken from the decree.

The court enters judgment; appeals may be taken

The decree of the court is *conclusive* as to the rights of all existing claimants lawfully included in the determination. It therefore adjudicates the water right of every claimant as against all of the others.

The procedure for determining and adjudicating water rights provided by California law is designed (1) to establish all existing rights, and (2) to provide a basis for public supervision of diversion if the latter is found necessary to insure to each user his rightful supply in accordance with his established priority. Insuring to each user his rightful supply without conflict and without litigation is the ultimate purpose of water-right administration, not only in California, but in all the western states; and this purpose may not be fully accomplished until the relative rights of all users on any stream are made certain by determination and court adjudication, and by public supervision of diversions if found desirable and necessary.

The procedure for determination and adjudication of water rights is being applied in California as the need develops and as the facilities at the disposal of the Division of Water Resources permit.

ADMINISTRATION of water rights

Water may be distributed by a State watermaster

The Department of Public Works, through the agency of the State Engineer, may create *watermaster service areas* for the distribution of water to those entitled to receive it. The Department may appoint a *watermaster and deputies* for this purpose in a service area if the owners of at least 15 per cent of the conduits request it. Half of the cost of administration and distribution of water within a service area is paid by the State, and half by the holders of the water rights (Water Code, secs. 4000 to 4407):

State supervision of

DAMS

Nonfederal dams of certain sizes must be supervised

The Water Code makes it the duty of the Department of Public Works, acting through the State Engineer, to *supervise dams* in order to prevent injury to life and property by reason of their failure (secs. 6000 to 6501).

DAMS SUBJECT TO SUPERVISION

Supervision of dams does not apply to those owned by the *United States Government*.

Dams *other than those of the United States* are subject to supervision if they meet either of the following conditions, the height in each case being the vertical distance from the level of the natural stream bed at downstream toe to the crest of the spillway: (1) 25 feet or more in height, if capable of storing more than 15 acre-feet of water; or (2) capable of storing 50 acre-feet or more of water, if more than 6 feet high.

Whenever the term “dam” is used henceforth in this circular, it refers to one that is subject to State supervision.

OPERATIONS SUBJECT TO SUPERVISION

Construction and Enlargement of Dams

Plans must be approved

Construction of a new dam, or *enlargement* of any dam, may not be commenced until the owner has applied to and obtained from the Department *written approval* of his plans and specifications. Printed forms for the application are furnished by the Department.

Filing fees are based upon the estimated cost of the dam. As of July 1, 1955, the fee for the first \$100,000 of cost is 1½ per cent of the estimated cost, with smaller

percentages for higher costs (sec. 6300). As the minimum fee is \$20, the fee for a dam costing \$1,000 would therefore be \$20, and for a dam costing \$2,000 the fee would be \$30. The filing fee must be paid before an application will be considered; but the cost in many cases may be small in comparison with the benefits to be derived from the impounded water.

It is important to note that an *application for approval of a dam* and an *application for a permit to appropriate water* are two *entirely different things*, even though both are filed in the same State office. Approval of plans and specifications for a dam is not a permit or license to appropriate the water to be stored behind the dam. The right to impound the water must be initiated according to the procedure outlined above under "The appropriate right—acquiring" (p. 23–27).

*There is a
filing fee*

*Approval is not a
permit to
appropriate water*

Repair, Alteration, and Removal of Dams

Before the owner of a dam begins to make repairs or alterations or to remove it, he must apply to and obtain from the Department *approval* of his plans and specifications. Printed forms are furnished for these applications. No filing fees are prescribed.


*Approval must be
had for any
change in dams*

Continued Supervision

The Department is authorized to *inspect* work done under approved plans and specifications, and to revoke its approval if the work is not done properly or if it develops that a safe dam cannot be constructed. Supervision of the Department extends also to the *maintenance and operation* of dams. Owners of dams may be required to report upon their condition, and to perform, at their own expense, work necessary to render them safe.

*The Department
may inspect the
dam later*

*and may order
repairs*



"The water right is a property right. It is a valuable right. And it is real estate. . . . The holder of a water right in an area in which the competition for water is keen needs to be constantly on guard to protect his right against infringement or loss. It is said that 'Eternal vigilance is the price of a good water right.'"